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**BOARD OF PATENT APPEALS AND INTERFERENCES
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of:

Gaelle Chevalier

Serial No.: 10/776,811

Filed: February 11, 2004

For: Polyol Formulation

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Group Art Unit: 1711

Examiner: John M. Cooney

Atty. Docket: SHELL-TS6691

AMENDED BRIEF FOR APPELLANT

Commissioner for Patents
PO BOX 1450
Alexandria, VA 22313-1450

TABLE OF CONTENTS

Table of Contents	2
Real Party in Interest	3
Related Appeals and Interferences	4
Status of Claims	5
Status of Amendments	6
Summary of the Claimed Subject Matter	7
Grounds of Rejection to Be Reviewed on Appeal	8
Argument	9
Claims Appendix	
Evidence Appendix	
Related Proceedings Appendix	

REAL PARTY IN INTEREST

The real party in interest in this appeal is Shell Oil Company.

RELATED APPEALS AND INTERFERENCES

Appellant, its legal representative, and its assignee are unaware of any other appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in this pending appeal.

STATUS OF CLAIMS

Claims 1-14 were finally rejected in the final action mailed May 31, 2006. A notice of appeal and request for extension of time to file same was filed on October 31, 2006 and received in the United States Patent Office on November 3, 2006.

STATUS OF AMENDMENTS

All amendments have been entered. A copy of appealed claims 1-14 appears in the Claims Appendix.

SUMMARY OF THE CLAIMED SUBJECT MATTER

The claims provide a formulation and a process for preparing high resilience foam comprising a polyol formulation comprising a combination of [(a) + (b)], below. (Specification, page 2, ll. 10-16).

Specifically, claim 1 provides a formulation for preparing high resilience foam comprising, based on total amount of polyol:

- (i) 100 parts by weight of a polyol formulation comprising:
 - (a) a polymer-modified polyol formed by polymerizing an **olamine** with an organic polyisocyanate in the presence of a polyol,
 - (b) a polymer-modified polyol formed by polymerizing one or more **ethylenically unsaturated monomers** in the presence of a polyol, and
 - (c) optionally further polyolwherein the polyol present in polymer-modified polyol (a) and polymer-modified polyol (b) is prepared from hydroxyl containing starting compounds and is not an amine-based polyol;
- (ii) 0.1 to 6 parts by weight of blowing agent;
- (iii) 0 to 5 parts by weight of crosslinking agent(s);
- (iv) 0.01 to 2.5 parts by weight of polyurethane catalyst(s); and optionally
- (v) further auxiliaries.

(Specification, page 2, l. 33-p. 3, l. 5, and claim 1, emphasis added). Claims 2-7 depend from claim 1.

Independent claim 8 is directed to a process for preparing a high resilience polyurethane foam comprising mixing the foregoing formulation with an isocyanate at an isocyanate index of from 80 to 130. (Specification, page 2, ll. 28-31 and p. 11, ll. 4-22, and claim 8). Claims 9-14 depend from claim 8.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. Whether claims 1-14 are anticipated under 35 U.S.C. § 102(b) over U.S. Patent No. 4,816,494 to Watson, Jr., et al ("Watson");
2. Whether claims 1-14 are obvious under 35 U.S.C. § 103(a) over Watson.

ARGUMENT

I. Background

Claims 1-14 are directed to polyol formulations and to processes for preparing high resilience polyurethane foam using polyol formulations which produce high resilience foams having a relatively low "wet compression set." Specification, p. 8, ¶ [0018].

High resilience foams predominantly exhibit elastic behavior, meaning that they change shape when force is applied but return nearly instantaneously to their initial shape when the applied force is removed. Specification, p. 1, ¶ [0002]. The wet compression set is a measure for the durability of a foam in humid conditions. Specification, p. 2, ¶ [0004].

The polyol formulation of claims 1-14 comprises a combination of [(a) + (b)]:

- (a) a polymer-modified polyol formed by polymerizing an **olamine** with an organic polyisocyanate in the presence of a polyol; and
- (b) a polymer-modified polyol formed by polymerizing one or more **ethylenically unsaturated monomers** in the presence of a polyol.

The examples demonstrate that combining (a) + (b) and using the polyol formulation comprising [(a) + (b)] produces a foam having a higher % resilience and a lower wet compression set % compared to using a polyol formulation containing either (a) or (b), **individually**, to produce the foam. Specification, pages 13-17. See Tables esp. "Resilience, %," and "Wet compression set, %" for Comparative examples comprising either "PIPA polymer polyol" or "SAN polymer polyol" versus the results of the experimental example comprising both.¹

II. WHETHER CLAIMS 1-14 ARE ANTICIPATED UNDER 35 U.S.C. § 102(b) OVER U.S. PATENT NO. 4,816,494 TO WATSON, JR., ("WATSON")

1. The rejection

The examiner rejected claims 1-14 as anticipated under 35 U.S.C. § 102(b) over Watson.

The examiner contends that

Watson, Jr. et al. disclose preparations of polyurethane foams from combinations of polymer-modified polyols as claimed by applicants, blowing agents and catalysts as claimed by applicants, and other additives and reactants which are combined with

¹ PIPA polymer polyol (a) comprises "the condensation product of triethanolamine and toluene diisocyanate (TI). Specification, p. 13, ¶ [0031]. SAN polymer polyol (b) comprises "a copolymer of styrene and acrylonitrile." Specification, p. 13, ¶ [0032].

isocyanates at indices as defined by applicants' claims (see column 3 line 30-column 5 line 21, column 5 lines 53-col. 7 line 23, and the examples, as well as, the entire document).

2. Rebuttal

The examiner has the burden to establish a *prima facie* case of unpatentability of the pending claims on any grounds, including anticipation. *In re Oetiker*, 24 U.S.P.Q.2d 1443 (Fed. Cir. 1992). In order to establish a case of *prima facie* anticipation, the examiner has the burden to point to a teaching in Watson of every limitation of the rejected claims either explicitly or inherently. *Atlas Powder Co. v. Ireco Inc.*, 51 USPQ2d 1943, 1945 (Fed. Cir. 1999).

The examiner has not pointed to any teaching or suggestion *at all* in Watson to combine *two or more different* polymer-modified polyols to produce a polyol formulation. The examiner certainly has not pointed to a teaching in Watson to produce a polyol formulation by combining (a) a polymer-modified polyol formed by polymerizing an olamine with an organic polyisocyanate in the presence of a polyol; and (b) a polymer-modified polyol formed by polymerizing one or more ethylenically unsaturated monomers in the presence of a polyol.

a. Watson

Watson describes

A densified polyurethane foam having unexpected enhanced cushioning properties over those of known densified polyurethane foams and suitable for use as furniture cushions, automotive cushions, mattresses, etc. and having a unique and superior feeling of comfort resulting from a soft touch yet with a deep firm support with an appropriate springiness to the foam.

Watson, col. 3, ll. 3-9. Watson's "densified polyurethane foam" is prepared from "a formulation of from 90-10 parts by weight of a polymer-polyol or graft-polyol composition, specifically, polymer- or graft-polyols containing about 10-40% polymer solids." Watson, col. 3, ll. 10-13.

According to Watson,

The polymer-polyols or graft-polyols utilized in the present invention may be of several types, including the vinyl-type, as described in U.S. Pat. Nos. 3,383,351 and 3,304,273, or the step-growth polymerization types, as described in U.S. Pat. Nos. 4,374,209 and 3,325,421, the disclosures of all of which are incorporated herein by reference.

Watson, col. 3, ll. 67-col. 4, l. 5.

Watson lists examples of suitable monomers/polymers for producing polymer-modified polyols, and/or suitable polymer-modified polyols.

Watson's examples include "ethylenically unsaturated monomers" (col. 4, l. 33-44). Watson's examples also include "polymer-modified polyol formed by polymerizing an olamine." Watson, col. 5, ll. 11-12.

Watson's examples also include:

- "polymerizate obtained by polymerizing an ethylenically unsaturated monomer to a molecular weight of at least 5000 and to a solid concentration of about 10% to about 50% by weight in the polyol," Watson, col. 4, ll. 54-66;
- "a stable dispersion of a urea in an organic polyhydroxy compound having at least two alcoholic hydroxyl groups, a molecular weight of at least 500 and a hydroxyl number of not more than about 225," Watson, col. 4, l. 68-col. 5, l. 3; and,
- "a monomer mixture of (a) from 33 to 75 weight percent of acrylonitrile or methacrylonitrile and (b) from 25 to 67 weight percent styrene or alpha-methyl styrene." Watson, col 5, ll. 27-33

- b. **The examiner has not pointed to a teaching in Watson of every limitation of claims 1-14**

In rejecting the claims under 35 U.S.C. § 102, "it is incumbent upon the Patent Office . . . to set forth clearly why it regards a claim to be anticipated." *In re Mullin*, 179 U.S.P.Q. 97, 100 (C.C.P.A. 1973). In the present case, the examiner very broadly asserts that Watson anticipates the claims, citing "column 3 line 30-column 5 line 21, column 5 lines 53-col. 7 line 23, and the examples, as well as, the entire document." Final Action, page 2, emphasis added.

The foregoing rejection is very similar to the rejection at issue in *Mullin*, where the examiner rejected the claims "as obviously anticipated by Haigis et al. under 35 U.S.C. 102." *Id.* at 100. The Court of Customs and Patent Appeals found that "[a] broad statement such as that . . . does not necessarily inform an applicant of the reason his claims are regarded as defective." *Id.*

The examiner has not pointed to any teaching in Watson to combine **two or more different polymer-modified polyols** to produce a polyol formulation. The examiner certainly has not pointed to a teaching in Watson to produce a **polyol formulation by combining (a) a polymer-modified polyol formed by polymerizing an olamine with an organic polyisocyanate in**

the presence of a polyol; and (b) a polymer-modified polyol formed by polymerizing one or more **ethylenically unsaturated monomers** in the presence of a polyol.

In response to the rejection in the first office action, which was mailed September 27, 2005, Appellant traversed the anticipation rejection, arguing that "Applicants' claimed combination of two polymer-modified polyols, (a) and (b), distinguishes over Watson." Amendment and Response mailed March 16, 2006, p. 8. Appellant also pointed out that Watson's Examples use a polyol mixture containing only one kind of polymer polyol in addition to the base polyol.² *Id.*

The examiner maintained the anticipation rejection, responding that "[d]isclosure of Watson, Jr. et al. is not limited to what is disclosed by the examples." Final Action, pp. 2-3.

Appellant never has contended that Watson's disclosure is limited to the examples. Appellant does contend that the examiner has not met his burden to point to a teaching of every limitation of the pending claims in Watson.

Specifically, Appellant contends that the examiner has not pointed to a teaching in Watson to combine two or more different polymer-modified polyols to produce a polyol formulation. Appellant also contends that the examiner has not pointed to a specific teaching in Watson of a polyol formulation comprising (a) a polymer-modified polyol formed by polymerizing an **olamine** with an organic polyisocyanate in the presence of a polyol; and (b) a polymer-modified polyol formed by polymerizing one or more **ethylenically unsaturated monomers** in the presence of a polyol. Claim 1 and claim 8, and claims depending therefrom.

If the examiner contends that the missing teaching is inherent in Watson, then the examiner has not met his burden for the additional reason that he has not provided the necessary **basis in fact and/or technical reasoning to reasonably support a determination that the allegedly inherent characteristic necessarily flows from the teachings of** Watson. See *Crown Operations Int'l Ltd. v. Solutia Inc.*, 62 U.S.P.Q.2d 1917, 1922-1923 (Fed Cir. 2002), *reh'g denied* 2002 U.S. Lexis 13283 (Fed. Cir. June 10, 2002), and MPEP 2112. Where an examiner relies on a theory of inherency, "the extrinsic evidence 'must make clear that the

² Watson Examples 1-14 use Niox Polyol 34-28, "a stable dispersion of a poly (styrene-co-acrylonitrile) polymer in a polyether polyol available from Union Carbide." See footnote to the ingredients table in Example 1, Watson, col. 8, ll. 11-30. Watson Examples 15-16 used Multanol Polyol B-255, "a high molecular weight polyether polyol containing a polyurea dispersion available from Mobay Chemical Company." See footnote to Watson Table IV, col. 10, ll. 1-25.

missing descriptive matter is necessarily present in the thing described in the reference, and that it would be recognized by persons of ordinary skill.” *In re Robertson*, 49 U.S.P.Q.2d 1949, 1950-51 (Fed. Cir. 1999).

The examiner has not established that Watson expressly or inherently teaches combining two or more *different* polymer-modified polyols to produce a polyol formulation. The examiner certainly has not pointed to a teaching or suggestion of a polyol formulation comprising (a) a polymer-modified polyol formed by polymerizing an olamine with an organic polyisocyanate in the presence of a polyol; and (b) a polymer-modified polyol formed by polymerizing one or more ethylenically unsaturated monomers in the presence of a polyol. The examiner therefore has not pointed to a teaching in Watson every limitation of claims 1-14, and has not established a case of *prima facie* anticipation of claims 1-14.

Appellant respectfully requests that the anticipation rejection be reversed.

III. WHETHER CLAIMS 1-14 ARE OBVIOUS UNDER 35 U.S.C. § 103(a) OVER WATSON

1. The rejection

The examiner rejected claims 1-14 as obvious over Watson. The examiner admits that “Watson . . . differs from [Appellant’s] claims in that it does not particularly require combinations of polymer modified polyols as claimed.” Final Action, page 3 (emphasis added). The examiner argues that Watson “does disclose employment of each of the claim selected polymer-polyols as being acceptable for the purpose of achieving the enhanced cushioning properties desired.” The examiner argues that

it would have been obvious for one having ordinary skill in the art to have employed combinations of the recited polymer polyols of Watson . . . for the purpose of providing enhanced cushioning effects in products derived therefrom in order to arrive at the products and processes of applicants’ claims with the expectation of success in the absence of a showing of new or unexpected results.

Final Action, page 4. The examiner cites several cases for the proposition that “it is *prima facie* obvious to substitute equivalents, motivated by the reasonable expectation that the respective species will behave in a comparable manner or give comparable results in comparable circumstances.” *Id.* The examiner concludes that “the express suggestion to substitute one equivalent for another need not be present to render the substitution obvious.” *Id.*

In response to Appellant's comments that the examples weigh against the examiner's position, the examiner contends that "the evidence in the examples is not commensurate in scope with the scope of the claims, and it is not seen that applicants have demonstrated clear and convincing evidence of unexpected results." Final Action, pp. 4-5.

2. Rebuttal

In order to establish that the claims are *prima facie* obvious over Watson, the examiner must point to two things in Watson, and not in the Appellant's disclosure--(1) the suggestion of the invention, and (2) the expectation of its success. *In re Vaeck*, 20 U.S.P.Q.2d 1438, 1442 (Fed. Cir. 1991). The examiner did not meet this burden.

The examiner has not pointed to a teaching or suggestion in Watson, or elsewhere, to combine *two or more different* polymer-modified polyols to produce a polyol formulation. The examiner certainly has not pointed to a teaching or suggestion of a polyol formulation comprising the two specific polymer-modified polyols [(a) + (b)], as required by the claims. The examiner therefore has not pointed to a teaching or suggestion of the invention in Watson. *In re Vaeck*, 20 U.S.P.Q.2d at 1442

The examiner cannot establish a case of *prima facie* obviousness merely by arguing that Watson could be modified to incorporate something not taught or suggested by Watson, itself, or by another cited reference. In order to establish a case of *prima facie* obviousness, the examiner has the burden to point to a teaching or suggestion in the references themselves that it would be desirable to make the modification(s) required to produce the claimed method or composition. *In re Brouwer*, 37 U.S.P.Q.2d 1663, 1666 (Fed. Cir. 1995).³

The examiner attempts to meet this burden by arguing that it would be obvious to substitute one "equivalent" polymer-modified polyol for another, citing a number of cases. However, the mere fact that (a) and (b) are included in Watson's list of suitable monomers/polymer-modified polyols does not even establish that (a) and (b) are equivalent to one another—or to the other members of Watson's list. "[M]ere inclusion of several compounds

³ The examiner cites *In re Fout* for the proposition that "the express suggestion to substitute one equivalent for another need not be present to render the substitution obvious." *In re Fout*, 213 U.S.P.Q. 532 (C.C.P.A. 1982). *Fout* was decided well before *In re Brouwer* and the cases cited in MPEP 2143.01, which specify that the examiner has the burden to point to a teaching or suggestion in the references themselves that it would be desirable to make the modification(s) required to produce the claimed method or composition.

in a list of compounds . . . does not necessarily establish that each of these compounds is 'equivalent' to the others for all purposes." *In re Jezl*, 158 U.S.P.Q. 98 (C.C.P.A. 1968). The fact that (a) and (b) are included in Watson's list certainly does not establish that a polyol formulation comprising [(a)+(b)] is equivalent to a polyol formulation comprising only a single member of Watson's list. "It is only where equivalence is known to the prior art or obvious to one of ordinary skill in the art that the substitution of one equivalent for another is not invention." *In re Ruff*, 118 U.S.P.Q. 340, 346 (C.C.P.A. 1958) (citations omitted).

In addition to the foregoing, the pending claims do not involve "substituting" one polymer-modified polyol for another polymer-modified polyol. To the extent that the claims involve a "substitution," a single polymer-modified polyol in a polyol formulation is substituted with a combination of two or more different polymer-modified polyols. Specifically, a single polymer modified polyol is substituted with the specific combination comprising [(a) + (b)]:

- (a) a polymer-modified polyol formed by polymerizing an olamine with an organic polyisocyanate in the presence of a polyol; and
- (b) a polymer-modified polyol formed by polymerizing one or more ethylenically unsaturated monomers in the presence of a polyol;

Claims 1 and 8. The examiner has not established that a polyol formulation comprising a single polymer-modified polyol is *equivalent* to a polyol formulation comprising a combination of two or more different polymer-modified polyols. The examiner certainly has not established that a polyol formulation comprising a single polymer-modified polyol is *equivalent* to a polyol formulation comprising the specific combination comprising [(a) + (b)].⁴

In any event, the correct question is whether the examiner has pointed to a teaching or suggestion in the cited references that it would be desirable to make the modification(s) required to produce the claimed method or composition. *In re Brouwer*, 37 U.S.P.Q.2d at 1666. *The answer is no.* The failure of the examiner to point to such a teaching or suggestion is telling given the evidence in the examples that a foam produced using the claimed polyol formulation comprising a combination of [(a) + (b)] has a higher % resilience and a lower wet compression

⁴ In fact, the data in Appellant's examples establishes that a polyol formulation comprising [(a)+(b)] is not equivalent to a polyol formulation comprising (a) or (b). See below.

set % than a foam produced using a polyol formulation comprising either (a) or (b), individually.⁵

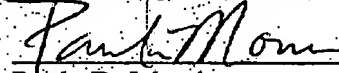
The examiner is legally incorrect in assuming that Appellant has the burden to show unexpected results. Before that burden arises, the examiner has the burden to establish a case of *prima facie* obviousness. *In re Oetiker*, 24 U.S.P.Q.2d at 1443. The examiner has not met this burden. As a result, it is simply irrelevant whether or not the evidence in the examples is "commensurate in scope" with the claims.

Appellant respectfully requests that the Board reverse the rejection of claims 1-14 as obvious under 35 U.S.C. § 103.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that the rejections be reversed. The Commissioner is hereby authorized to charge any fees in connection with this paper, or to credit any overpayment, to Deposit Account No. 19-1800 (File no. TS6691), maintained by Shell Oil Company

Respectfully submitted,



Paula D. Morris
Registration No. 31,516
Paula D. Morris & Associates, P.C.
d/b/a The Morris Law Firm, P.C.
10260 Westheimer, Suite 360
Houston, TX 77042
ATTORNEY FOR APPELLANT

⁵ Specification, pages 13-17. See Tables esp. "Resilience, %," and "Wet compression set, %" for Comparative examples comprising either "PIPA polymer polyol" or "SAN polymer polyol" versus the results of the experimental example comprising both.

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CLAIMS APPENDIX

1. A formulation for preparing high resilience foam comprising, based on total amount of polyol:
 - (i) 100 parts by weight of a polyol formulation comprising:
 - (a) a polymer-modified polyol formed by polymerizing an olamine with an organic polyisocyanate in the presence of a polyol,
 - (b) a polymer-modified polyol formed by polymerizing one or more ethylenically unsaturated monomers in the presence of a polyol, and
 - (c) optionally further polyolwherein the polyol present in polymer-modified polyol (a) and polymer-modified polyol (b) is prepared from hydroxyl containing starting compounds and is not an amine-based polyol;
 - (ii) 0.1 to 6 parts by weight of blowing agent;
 - (iii) 0 to 5 parts by weight of crosslinking agent(s);
 - (iv) 0.01 to 2.5 parts by weight of polyurethane catalyst(s); and optionally
 - (v) further auxiliaries.
2. The formulation of claim 1, wherein the polymer formed by polymerizing an olamine with an organic polyisocyanate and the polymer formed by polymerizing one or more ethylenically unsaturated monomers are present in a weight ratio in the range of from 1 : 10 to 10 : 1.

3. The formulation of claim 1, wherein the polyol formulation comprises of from 1 %wt to 15 %wt of polymer formed by polymerizing an olamine with an organic polyisocyanate and of from 1 %wt to 15 %wt of polymer formed by polymerizing one or more ethylenically unsaturated monomers.
4. The formulation of claim 3, wherein the polyol formulation comprises in total of from 1 %wt to 25 %wt of solid polymer particles.
5. The formulation of claim 1, in which the polymer present in the polyol formed by polymerizing an olamine with an organic polyisocyanate in the presence of a polyol is formed by polymerizing styrene optionally in combination with acrylonitrile.
6. The formulation of claim 1, wherein the polymer-modified polyol containing polymer formed by polymerizing an olamine with an organic polyisocyanate comprises from 5 wt% to 50 wt% of polymer in the polymer-modified polyol.
7. The formulation of claim 1, wherein the polymer-modified polyol formed by polymerizing an olamine with an organic polyisocyanate in the presence of a polyol, and the polymer-modified polyol formed by polymerizing one or more ethylenically unsaturated monomers in the presence of a polyol comprise polyalkoxylated polyols.
8. A process for preparing a high resilience polyurethane foam comprising:
mixing a formulation comprising:
 - (i) 100 parts by weight of a polyol formulation comprising:
 - (a) a polymer-modified polyol formed by polymerizing an olamine with an organic polyisocyanate in the presence of a polyol,
 - (b) a polymer-modified polyol formed by polymerizing one or more ethylenically unsaturated monomers in the presence of a polyol, and
 - (c) optionally further polyol
wherein the polyol present in polymer-modified polyol (a) and polymer-modified polyol (b) is prepared from hydroxyl containing starting compounds and is not an amine-based polyol;

- (ii) 0.1 to 6 parts by weight of blowing agent;
 - (iii) 0 to 5 parts by weight of crosslinking agent(s);
 - (iv) 0.01 to 2.5 parts by weight of polyurethane catalyst(s); and optionally
 - (v) further auxiliaries
- with an isocyanate at an isocyanate index of from 80 to 130.

9. The process of claim 8 wherein the blowing agent comprises water.
10. The process of claim 8 wherein the crosslinking agents comprise polyfunctional alkanol amines.
11. The process of claim 8 wherein the polyurethane catalysts comprises a tertiary amine catalyst.
12. The process of claim 8 wherein the auxiliaries comprise fillers, flame retardants, foam stabilizers and colorants.
13. The process of claim 8 wherein the isocyanate index is between 100 to 120.
14. The process of claim 8 wherein the isocyanate comprises a polyisocyanate.

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EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.